86-237

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

RICHARD F. KOEHNKE,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

Mr. John D. Finerty
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Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Was the warrantless search of the petitioner's home excused under the exigent circumstances or emergency exception when the primary purpose of the search was to locate and arrest the petitioner for driving while intoxicated?

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OPINIONS BELOW

The petitioner's motion to suppress evidence seized pursuant to the warrantless search of the petitioner's residence was denied by the trial court orally on January 25, 1985 (A-26). The Wisconsin Court of Appeals affirmed the petitioner's conviction in an opinion filed December 26, 1985 (A-5), and the Wisconsin Supreme Court denied the petitioner's petition for review on June 10, 1986 (A-3).

JURISDICTION

The decision of the Wisconsin Supreme Court was filed on June 10, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The fourth amendment to the United States Constitution provides in pertinent part: "The

right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ."

The fourteenth amendment provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

The petitioner, Richard F. Koehnke, was arrested on September 21, 1984, and charged with operating a vehicle while intoxicated. The facts show that Koehnke had an accident with his motorcycle which caused a neighbor to call the police. Before the police arrived, Koehnke had recovered from his mishap and had driven to his residence, where he parked his

motorcycle in the garage and closed the door. The police, acting on the neighbor's belief that Koehnke was intoxicated, drove to Koehnke's residence, looked in the garage to see the motorcycle, and went to the front door. The owner of the house, Bruce Durbin, told the officers that Koehnke was all right, but the officers entered without consent and searched the house in a room-by-room fashion until they discovered and arrested Koehnke in the bathroom.

This search took place without a warrant, and the police attempted to justify this warrantless entry on the basis of their concern for Koehnke's injuries. However, rescue squad personnel who had been called to the scene left without treating Koehnke, and the police delayed taking Koehnke to the hospital while arresting other individuals at

the house for obstructing the officers.

Prior to trial, Koehnke made a motion to suppress the evidence of the blood test on the basis that it was the fruit of an unconstitutional warrantless search of his residence (A-25). A hearing was had on this motion on January 25, 1985, at which time the court ruled that the evidence should not be suppressed (A-26). Koehnke was then convicted. On appeal, Koehnke again raised his constitutional claim, but the Wisconsin Court of Appeals affirmed his conviction (A-5) and the Wisconsin Supreme Court denied his petition for review (A-3).

ARGUMENT

THE PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE THE TRIAL COURT ERRED IN EXCUSING THE WARRANTLESS SEARCH OF THE PETITIONER'S RESIDENCE UNDER THE EXIGENT CIRCUMSTANCES OR EMERGENCY EXCEPTION EVEN THOUGH THE REAL REASON FOR THE SEARCH WAS TO LOCATE AND ARREST THE PETITIONER FOR DRIVING WHILE INTOXICATED

It is well established by this Court that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1972). On several occasions this Court has emphasized that warrantless arrests in the home are prohibited by the fourth amendment, absent probable cause and exigent circumstances. Welsh v. Wisconsin, 104 S.Ct 2091 (1984); Payton v. New York, 445 U.S. 573 (1980); see also Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971) ("a search or

seizure carried out on a suspect's premises without a warranty is per se unreasonable, unless the police can show . . . the presence of 'exigent circumstances'").

The police bear a "heavy burden" when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Welsh v. Wisconsin, supra, 104 S.Ct. at 2097. Moreover, this Court noted in Welsh that its "hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is especially appropriate when the underlying offense for which there is probable cause to arrest is relatively minor." Id. at 2098. Thus, when the government's interest is to arrest for a minor offense, such as a first offense for driving while intoxicated in Wisconsin, the presumption of unreasonableness is difficult to rebut, and

the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate. Id.

In Welsh, this Court conclusively established, on facts similar to those in the present case, that the desire to preserve evidence was an insufficient exigent circumstance to justify the warrantless entry into a home to arrest a person suspected of drunk driving. Reversing the Wisconsin Supreme Court, this Court found that the state's interests in obtaining evidence were greatly outweighed by the privacy interests protected by the fourth amendment. The Court also made it clear that exigent circumstances justifying a warrantless entry could not be shown by arguing that the police were engaged in hot pursuit, since there was no continuous pursuit

of the defendant from the scene of the crime, or by arguing that a threat to public safety existed, since the defendant was already at home. Id. at 2099.

In light of the clear holding in Welsh, in this case the state argued below that the officers' concern for Koehnke's safety provided sufficient exigent circumstances to justify the warrantless search of his residence. Accepting this rationale, the trial court and the Wisconsin Court of Appeals concluded that the real motivation for the warrantless entry into Koehnke's house was the fear that he was injured and would need medical assistance. Citing the "emergency" exception to the warrant requirement which is "grounded on notion that the preservation of human life is paramount to the right of privacy protected by the fourth amendment,"

the court of appeals held that the entry, search, and arrest were justified (A-13).

A close examination of the facts in this case, however, demonstrates that the invocation by the officers of the emergency exception to the fourth amendment's warrant requirement was merely a subterfuge to avoid the clear holding of Welsh v. Wisconsin, supra, and to enable them to arrest Koehnke in order to give him a blood test as quickly as possible. As was stated in McDonald v. United States, 335 U.S. 451, 454 (1948), "[t]his is not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law." The need for entry was simply not that great.

At the suppression hearing in this case, the officers testified that although they saw blood at the scene of the accident, they knew

that Koehnke had driven his motorcycle away and that he had travelled some distance away while on the motorcycle. Moreover, Koehnke had parked his motorcycle in the garage adjacent to his house and closed its door before going into the house. In addition, the officers testified that Bruce Durbin, the owner of the house, had told them that Koehnke was all right and did not need any medical assistance. Although the officers claimed that they had seen drops of blood on the front step, this evidence was contradicted by several other witnesses. This paucity of information regarding a supposed injury hardly comprises the type of true medical "emergency" which justifies a warrantless nighttime search of a private residence.

Moreover, the conduct of the officers after finding Koehnke clearly demonstrated

that their primary concern was not for his health, and completely undermines any claim that their entry into the house was based on humanitarian concerns. The officers, who previously testified that they believed that Koehnke was suffering from a head injury and was intoxicated, thus making it impossible for him to make a rational decision about obtaining medical care, then testified that the rescue squad was sent away without having examined Koehnke, solely on the basis that Koehnke said that he did not need any medical attention. Thus, the credibility of the officers' claim that they originally tried to find Koehnke to protect him from his own inability to make rational decisions, and of their claim that they could not believe that Bruce Durbin would know if Koehnke really needed assistance, was discredited by their

own subsequent testimony. Koehnke was then taken to the squad car where he sat for quite some time while an officer first went back into the house to arrest the other persons in the house for obstruction of an officer. Only after these additional citations were written up was Koehnke taken to the hospital, where the officers immediately requested a blood test.

These facts do not meet the strict requirements needed to show valid exigent circumstances under the test set forth in Welsh v. Wisconsin, supra, and in other cases dealing with exigent circumstances based on medical emergencies. As was emphasized in Welsh, the exigent circumstances exception to the warrant requirement must be strictly construed. 104 S.Ct. at 2097. In applying the emergency exception, the courts have

indicated that a true emergency must exist to supply the reasonableness necessary to satisfy the fourth amendment. "The protection of human life or property in imminent danger must be the motivation for the search rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding." People v. Mitchell, 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607, 610 (1976). In short, the emergency doctrine is defined as requiring that the law enforcement officers enter "without the accompanying intent to either search or arrest." United States v. Barone, 330 F.2d 543, 545 (2d Cir. 1964). In evaluating the motivation of officers, "[a]ny conduct within by the officer which is in any way inconsistent with the purposed reason for the entry is a just cause for healthy skepticism by the courts." W. LaFave, Search and

Seizure: A Treatise on the Fourth Amendment § 6.6 at 473 (1978). "[I]t is essential that courts be alert to the possibility of subterfuge, that is, a false claim of such a purpose where the true intent is to seek evidence of criminal conduct." Id. See Bray v. State, 597 S.W.2d 763 (Tex. Crim. App. 1980) (reversing conviction because officers had entered apartment even though they had been told as they walked in that defendant was not in need of assistance).

The record in this case shows that the officers' purported motivation was in fact merely an excuse to apprehend Koehnke quickly for driving while intoxicated. The reliance on the emergency or exigent circumstances exception to the fourth amendment was in reality simply a means of avoiding the holding in this Court's decision in Welsh v. Wiscon-

sin, supra. Thus, it is important that the Court grant this Petition for a Writ of Certiorari both in order to clarify the scope of the emergency exception and to insure that its decision in Welsh is given proper effect.

CONCLUSION

For the foregoing reasons, the petitioner, Richard F. Koehnke, respectfully requests this Court to grant this petition and issue a writ of certiorari to the Wisconsin Supreme Court.

Respectfully submitted,

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No.

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STATE OF WISCONSIN,

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WRIT OF CERTIORARI
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APPENDIX

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Office of the Clerk

SUPREME COURT

STATE OF WISCONSIN

Madison, June 10, 1986

To: **Hon. John R. Race**
Circuit Court for Walworth County
Br. 3, Walworth County Courthouse
Elkhorn, WI 53121

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The Court today announced an order in your case as follows:

No. 85-1141-CR **State v. Koehnke**

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner Richard F. Koehnke, and considered by the court,

IT IS ORDERED that the petition is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court.

No. 85-1141-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD F. KOEHNKE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth county: JOHN R. RACE, Judge. Affirmed.

NETTESHEIM, J. Richard F. Koehnke appeals from a judgment of the circuit court of Walworth county, convicting him of operating a motor vehicle while intoxicated, in violation of sec. 346.63(1)(a), Stats. Prior to trial, Koehnke sought to exclude results of

a blood test on the basis that it was the product of an unlawful search and seizure and that the implied consent law was not followed.[1] The trial court denied his motion to suppress.

Koehnke raises two issues on appeal. First, he claims that a warrantless entry into a home and his subsequent arrest was in violation of art. 1, § 11 of the Wisconsin Constitution and the fourth amendment to the United States Constitution. Second, Koehnke claims the officers were under a duty, pursuant to sec. 343.305(5), Stats., to provide an additional chemical test to determine Koehnke's BAC. We conclude that the warrantless entry and subsequent arrest were valid under the emergency exception to the warrant requirement. We also conclude that Koehnke was permitted a reasonable opportunity to have a

second blood test administered. Accordingly, we affirm.

On September 21, 1984 at approximately 1:41 a.m., two police officers were dispatched to an injury accident in the Honey Creek area of Walworth county. Upon arrival, they were met by a citizen who told them he had heard an accident, came out of his house, found a motorcycle overturned and observed a person, whom he identified as Koehnke, with a head injury. The officers observed a seven-to eight-inch puddle of blood at the accident scene. Believing Koehnke to be intoxicated, the citizen withheld the motorcycle keys from Koehnke. Koehnke, nonetheless, started the motorcycle and drove away.

The police canvassed the area and were eventually directed to a residence where they looked through a garage window and saw a

damaged motorcycle. A license check revealed that the motorcycle was registered to a Richard Koehnke. The officers approached the house and were met outside by the owner, Bruce Durbin, who told the officers that Koehnke was inside and all right. Durbin appeared intoxicated. The officers observed drops of blood on the sidewalk approach to the house.

The officers then entered the house to search for Koehnke. Several people in the house told the officers they did not know Koehnke. Eventually, Koehnke was found hiding in the bathroom. He appeared intoxicated and was placed under arrest for operating a motor vehicle while intoxicated in violation of sec. 346.63(1), Stats. Koehnke refused an offer of medical treatment from rescue workers who had been earlier summoned. Koehnke was then placed in a squad car while the officers re-

turned to the house and issued citations for obtructing justice to those who denied knowledge of Koehnke's presence.

The officers transported Koehnke to a hospital where the was requested to submit to a blood test under the implied consent law. Koehnke called his attorney who advised Koehnke to submit to a blood test only upon the condition that a second blood test be taken an hour later. Koehnke conveyed this request to the officers and then submitted to the blood test. Koehnke was then given medical treatment by the hospital staff. A second test was not given.

We first determine whether the warrantless entry to the Durbin residence was valid.[2] Koehnke argues that the exigent circumstances doctrine governs under the facts of this case. The state, on the other hand,

argues that the emergency doctrine governs. We conclude that the facts of this case fall within the emergency exception to the warrant requirement.

It is a basic principle of fourth amendment law that searches and seizures inside a home without a warrant are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). An entry to arrest and an entry to search for and to seize property implicate the same interests in preserving the sanctity and privacy of the home and justify the same level of constitutional protection. Payton v. New York, 445 U.S. 573, 588 (1980). Accordingly, the physical entry of the home is the chief evil against which the wording of the fourth amendment is directed, id. at 585,

and, as such, absent exigent circumstances, that threshold may not reasonably be crossed without a warrant, id. at 590.[3]

An officer may make a warrantless entry of a home under exigent circumstances if the officer has probable cause to believe a felony has been committed. Id. at 587-89. When there is probable cause to believe that only a minor offense has been committed, application of the exigent circumstances exception should rarely be sanctioned. Welsh v. Wisconsin, 466 U.S. 740, ___, 80 L. Ed.2d 732, 745 (1984).[4]

The exigent circumstances exception is generally recognized in only two situations: the hot pursuit of a fleeing felon, see Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), and a search or seizure to avoid the destruction of evidence, see

Schmerber v. California, 384 U.S. 757 (1966). Schmerber, however, did not involve entry into a home. The United States Supreme Court has, thus far, only applied the hot pursuit of a felon as justification for a warrantless entry into a home and subsequent arrest. See United States v. Santana, 427 U.S. 38 (1976). Wisconsin recognizes both categories of exigent circumstances. This case suggests neither.

The emergency doctrine is frequently viewed as merely an aspect of the exigent circumstances rule. As such, courts frequently use the terms interchangeably, See, e.g., State v. Pires, 55 Wis.2d 597, 604, 201 N.W.2d 153, 157 (1972). However, they stand as separate and distinct doctrines. The warrantless entry of a home under the emergency doctrine is justified by a compelling purpose to render aid or assistance and not the need

to secure evidence. Id. at 604, 201 N.W.2d at 157. The emergency exception is "grounded on the notion that the preservation of human life is paramount to the right of privacy protected by the fourth amendment." State v. Boggess, 115 Wis.2d 443, 450, 340 N.W.2d 516, 521 (1983).

Our supreme court has adopted a two-step analysis for determining when a warrantless search is justified under the emergency doctrine. The analysis uses both subjective and objective tests. First, the searching officer must be motivated by a perceived need to render aid or assistance. Second, even though the requisite motivation exists, it must be found that a reasonable person under the circumstances would have thought an emergency existed. Id. at 450-51, 340 N.W.2d at 521; State v. Prober, Wis.2d 345, 365, 297

N.W.2d 1, 12 (1980)

We conclude that both prongs of this test are satisfied in this case. The officers testified that they made the entry to render aid to Koehnke, based on the accident information they had obtained. The trial court found that the subjective prong of the test was met in that the officers believed Koehnke was seriously injured and the officers entered to aid Koehnke. These findings are not clearly erroneous. See sec. 805.17(2), Stats.

We also conclude that a reasonable person, under these circumstances, would have believed an emergency existed, thus satisfying the objective prong. We will independently determine whether the constitutional requirement of reasonableness is met in a particular case. See State v. Kraimer, 99 Wis.2d 306, 319, 298 N.W.2d 568, 574 (1980), cert. denied,

451 U.S. 973 (1981). Here, the officers observed a puddle of blood at the accident scene, listened to the citizen's account of his contact with Koehnke, and observed the damage to the motorcycle and the blood on the sidewalk approaching the house. A reasonable person, under these circumstances, would have believed that a person in need of emergency medical care was inside the residence. The fact that Durbin assured the officers that Koehnke was all right would not deter a reasonable person from continuing to seek out Koehnke to render aid since Durbin himself appeared intoxicated. We therefore conclude that the warrantless entry was reasonable and therefore justified under the emergency doctrine.

Once legitimately on the premises under the emergency doctrine, an officer's

motivation for remaining on the premises can change after the emergency is discovered or dealt with.

> If law enforcement officers inadvertently discover incriminating evidence in plain view or as a result of some activity on their part which bears a material relevance to the initial purpose for their entry, "they may lawfully seize it without a warrant .... The exigent circumstances legitimate the presence, and the relevance of the discovery to the justification for the entry sanctions the seizure." ... However, searches which exceed the scope of an initially lawful intrusion are not permitted "unless further steps are taken to independently satisfy constitutional mandates." [Citations omitted.]

Prober, 98 Wis.2d at 362-63, 297 N.W.2d at 10.

Therefore, once legitimately on the premises, the officers may act upon evidence in plain view. Here, the officers, upon locating Koehnke, observed that he appeared intoxicated. Based upon these plain view ob-

servations, the officers arrested Koehnke. Thus, both the warrantless entry without consent and the subsequent arrest were valid under art. I, § 11 of the Wisconsin Constitution and the fourth amendment of the United States Constitution.

The next issue on appeal is whether Koehnke was given a reasonable opportunity to obtain a second blood test pursuant to sec. 343.305(5), Stats. We affirm the trial court's ruling denying Koehnke's motion to suppress.

Section 343.305(1), Stats., states that a driver is deemed to have given consent to one or more tests of his or her breath, blood or urine. A law enforcement agency must be prepared to administer, either at the agency or another facility, two of the three tests set forth in subsec. (2) (either the breath,

blood, or urine tests) and may designate which test shall be administered first. Under sec. 343.305(5), in addition to the primary test under subsec. (1), a defendant may request the alternative test provided by the agency in subsec. (1); or, the defendant, at his or her request and expense must have reasonable opportunity to choose his or her own person to administer a chemical test for the purpose specified in subsec. (1).

The second test provided under this statutory scheme "supplies an element of due process which may be missing where an alcohol test which is prima facie correct cannot be challenged because the chemical or reagents used in the original test cannot be retested." State v. Walstad, 119 Wis.2d 483, 526, 351 N.W.2d 469, 490 (1984). A second test may provide exculpatory evidence or, at least,

evidence material to the defendant's guilt or innocence. Id. at 526-27, 351 N.W.2d at 490-91.

In State v. Renard, 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985), the defendant asked for a breathalyzer test after submitting to the blood test. The second or additional test was not administered. Although Renard describes the second test requested as the "additional" test, it appears that the defendant may actually have been requesting the alternate test which the department must be prepared to administer. We make this observation because Renard requested a breathalyzer test which, presumably, would have been available only at the police station and also because Renard does not discuss the "reasonable opportunity" requirement which accompanies a request for an additional test. Our decision

contemplates the alternative test as the second test which a department must be prepared to administer and the additional test as that which a suspect requests at his own expense.

Renard held that the duty to perform an additional test under sec. 343.305(5), Stats., becomes mandatory after the defendant submits to the blood test, but also explained that:

> [w]e do not hold that the officer had a duty to remain indefinitely at the hospital until Renard's release, the officer did have a duty before leaving to make a final inquiry concerning the expected time of Renard's release. This duty existed because Renard requested an additional test, thereby requiring a diligent effort by the officer to comply with the demand.

Renard at 461, 367 N.W.2d at 238. The court further held that the statutory right to an

additional test must be strictly enforced because denial of an additional chemical test effectively prevents discovery of material evidence relating to the prior test. Id. at 461, 367 N.W.2d at 239.

Here, Koehnke did not request that the agency administer the alternative test required under sec. 343.305(1), Stats. Rather, Koehnke specifically asked for a second blood test. This was the equivalent of a request for the additional test. The statute imposes a requirement of a "reasonable opportunity" to the suspect to have this additional test. See sec. 343.305(5). To the extent that Renard may be unclear as to which test or tests were considered, we here extend Renard to either of the second tests contemplated under sec. 343.305(5). Thus, an officer must make a "diligent effort" to comply with the

demand for the alternative test and give a suspect a "reasonable opportunity" to obtain the additional test.

Here, although the record reveals that the officer did nothing to assist Koehnke in obtaining the additional test, we nonetheless conclude that Koehnke was accorded "reasonable opportunity" to obtain the additional test. Koehnke was in a hospital setting with nursing staff, doctors, and medical technicians who could administer a blood test. He had previously been properly informed under the implied consent law that he could have an additional test performed at his own expense and by a qualified person of his own choosing. Koehnke could not have been in a more appropriate setting to follow up on his request for a further blood test. We can only assume that all he had to do was ask and, perhaps, demon-

strate ability to pay. The officers did not impede Koehnke's ability to obtain the test. All of the attendant circumstances (including the officer's conduct) gave Koehnke "reasonable opportunity" to procure his own test. We therefore agree with the trial court's conclusion that the police officer had no further duty, under these circumstances, to actually see that the blood test was given.

For the foregoing reasons, we affirm the trial court.

By the Court.--Judgment affirmed.

Not recommended for publication in the official reports.

APPENDIX

[1] We note that the question of whether suppression of chemical test evidence is an appropriate sanction for a failure to follow the procedures of the implied consent law is presently on certification to the Wisconsin Supreme Court. The court has not, as yet, acted upon the certification request.

[2] Koehnke was at least a temporary resident at Durbin's residence and the question of Koehnke's standing to assert this issue is not raised.

[3] The court in Payton did not define the exigent circumstances which justify a warrantless home arrest or search. This left the initial application of the exigent circumstances exception to the trial courts. Welsh v. Wisconsin, 466 U.S. 740, ___, 80 L. Ed.2d 732 (1984).

[4] Wisconsin has recently extended the exigent exception to include the in-home warrantless arrest of a misdemeanant, given probable cause and the presence of exigent circumstances. State v. Smith, 125 Wis. 2d 111, 120-26, 370 N.W.2d 827, 832-34 (Ct. App. 1985) (Smith is on petition for review to the Wisconsin Supreme Court).

TRANSCRIPT--PRESENTING OF MOTION TO SUPPRESS

THE COURT: All right. I guess we have a motion to suppress. Is that, generally speaking, Mr. Ryan, what we're having?

MR. RYAN: Motion to suppress a blood test and motion to dismiss one of the other tickets.

TRANSCRIPT--DENIAL OF MOTION TO SUPPRESS

I will find that there were exigent circumstances existing because of the injury of the defendant and the severe nature which will allow them to enter this home prior to the time that the defendant may have, in fact, expired from his wound. So I will not suppress the search, and I will find that it was reasonable and under exigent circumstances under severe injuries and damage to the motorcycle of the defendant.